Cargo Logistics *and* Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 560, AFL–CIO. Case 22–CA–21933

September 28, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On July 14, 1998, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cargo Logistics, Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

"(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him, in any way."

Patrick E. Daly, Esq., for the General Counsel.
Frank K. Campisano, Esq., for the Respondent.
Howard A. Goldberger, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on June 3, 1998. The charge and amended charge were filed on March 17 and August 1, 1997, and the complaint was issued on November 3, 1997.

In substance, the complaint alleged that the Respondent engaged in a variety of 8(a)(1) conduct; that it discriminatorily discharged William Thompson because of his union activities, and that by its conduct it made a fair election impossible. Accordingly, the complaint, which alleged that a majority of the employees in an appropriate unit had selected the Union to be their representative, alleged that the Respondent, in violation of Section 8(a)(5), refused to recognize and bargain with the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, which is engaged in the moving and storage industry, admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE STIPULATION

The parties entered into a stipulation of facts regarding most of the allegations of the complaint. Accordingly, I make the following findings of facts and conclusions of law in conformity with the stipulation.

1. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All drivers employed by Respondent at its Newark, New Jersey facility, excluding all office clerical employees, managerial employees, professional employees, warehouse employees, guards and supervisors as defined in the Act.

2. The Union, Local 560, alleging that a majority of the employees in the above defined unit, filed a petition for an election in Case 22–RC–11361. On March 5, 1997, the Union requested the Respondent to bargain with it on behalf of the described unit of employees regarding wages, hours, and other terms and conditions of employment. The request was denied by the Respondent.

3. On February 27, 1997, and on various other unknown dates between February 27 and March 7, 1997, the Respondent by its owner, supervisor, and agent, Joe Cioffi, in violation of Section 8(a)(1) of the Act, interrogated its employees regarding their union membership, activities, and sympathies and the union activities and sympathies of other employees.

4. On or about February 27, 1997, and on various other unknown dates between February 27 and March 7, 1997, the Respondent by Cioffi, in violation of Section 8(a)(1) of the Act, threatened its employees with (a) shutting down its business; (b) operating its business under a different name and replacing the unit with owner-operators; and (c) termination of employees if they chose the Union as their collective-bargaining representative.

5. On or about February 27, 1997, and on various other unknown dates between February 27 and March 7, 1997, the Respondent by Cioffi, in violation of Section 8(a)(1) of the Act, promised its employees benefits if they rejected the Union as their bargaining representative.

6. In or about the week of March 3, 1997, the Respondent by Cioffi, violated Section 8(a)(1) of the Act by soliciting employees' complaints and promised its employees increased benefits and improved terms and conditions of employment if they refrained from union organizing activity.

7. On or about March 7, 1997, the Respondent, in violation of Section 8(a)(1) of the Act, initiated a petition for the purpose of soliciting unit employees to repudiate their support for and

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Certain inadvertent errors in the judge's decision have been noted and corrected.

assistance to the Union, and to revoke any and all authorization cards they may have signed designating the Union as their representative for the purposes of collective bargaining.

8. In or about the week of March 3, 1997, the Respondent by Cioffi, in violation of the Act, granted benefits to employees in order to discourage them from joining, supporting, or assisting the Union.

9. Subject to a check of the authorization cards by the New Jersey State Board of Mediation to confirm that a majority of the unit employees employed by Respondent during the week ending February 28, 1997, selected Local 560 to be their bargaining representative, the Respondent agrees to recognize Local 560 as the exclusive bargaining representative of the employees and further agrees that on request of Local 560, it will bargain in good faith with it regarding the wages, hours, and other terms and conditions of employment of the employees. The card check will be used to utilize W-2 forms or other documents signed by unit employees and that are satisfactory to counsel for the General Counsel and Local 560.[1]

Despite the stipulation noted above, pursuant to which the Respondent admitted most of the complaint's allegations, the parties could not resolve the allegation regarding the discharge of Thompson which occurred on April 15, 1997. Accordingly, that matter was reserved for a hearing and on June 3, 1998, I heard additional evidence presented by both sides.

III. THE DISCHARGE OF WILLIAM THOMPSON

William Thompson began his employment with the Respondent as a truckdriver in April 1996. It was acknowledged by Terminal Manager Karl Hightower Sr. that he was a good employee. During Thompson's employment, he never received any warnings except for an oral admonition regarding an alleged speeding incident which he denied. Although the record shows that other employees have received written warnings during the course of their employment, Thompson never received a written warning of any kind.

The Union approached employees in late February 1997 and Thompson was one of the people who signed a union authorization card. Subsequently, he had several conversations with the Respondent's owner, Joe Cioffi, in which Cioffi tried to convince Thompson to withdraw his support for the Union. Based on the evidence in this case, there is no doubt that on several occasions in late February and March 1997, Thompson made it plain to Cioffi that he strongly supported the Union. Also, the credited testimony indicates that Thompson was somewhat of an irritant to Cioffi in that Thompson expressed his skepticism regarding promises made to him by Cioffi.

As the evidence and the admissions show that the Respondent was aware of Thompson's sympathies for the Union and was engaged in antiunion conduct, the General Counsel, pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), has met his burden of showing, prima facie, that the Respondent was motivated by antiunion considerations in discharging Thompson.

In his opening statement, Respondent's counsel asserted that the reasons that the Respondent discharged Thompson were (a) because he was stealing time and (b) because Cioffi caught Thompson speeding on the New Jersey turnpike.

Terminal Manager Karl Hightower Sr. asserted, however, that Thompson was discharged because of three incidents. He claimed that the first incident occurred at some indeterminate time when some goods that Thompson was delivering to Power Flex fell off his truck and were damaged when he backed up and ran over them. Hightower did not, however, have any personal knowledge of the incident and the proof regarding its occurrence was vague at best. No warning was issued to Thompson in relation to this incident, whenever it occurred.

The second incident cited by Hightower involved a delivery to a store called Dress Barn on March 21, 1997. The Respondent contends that Thompson was late in making the delivery, left the truck unattended, and delayed his return to the terminal in order to avoid work.

In this instance, Thompson was the driver and Hightower's son was the helper. They left the Company at some time between 6:30 and 7 a.m. Their destination was a store in a shopping center in Lakewood, New Jersey, which, in traffic, would take about 2 hours to reach. On the way they got lost and Thompson called in to get directions. This caused the truck to be a little late and on arrival, somewhere between 9:15 and 9:30 a.m., the customer had a group of people ready to unload the trailer. (The trailers' contents were consigned only to Dress Barn.) As Thompson and Hightower Jr. were not needed or wanted to unload the trailer, they had coffee and hung around the shopping center until the unloading was finished. According to Karl Hightower Jr., this took about 4 hours to accomplish. When the delivery was finished, Thompson and Hightower Jr. started their drive back to the terminal. They arrived in Newark at around the normal quitting time and there is no evidence that they dawdled on their way home.

Neither William Thompson nor Karl Hightower Jr. received any kind of warning or reprimand in relation to the Dress Barn delivery.

The final incident cited by the Company involves a situation, allegedly occurring on April 2, 1997, where Cioffi claimed that he encountered Thompson speeding on the New Jersey Turnpike, between exits 12 and 13. (The speed limit there is now 65 miles per hour, and it is not uncommon to see vehicles, including trucks, going at least 5 miles an hour above the limit.) Cioffi did not testify about this incident although his friend, Richard Holck did. In this regard, Holck testified that while he and Cioffi were driving between exits 12 and 13, they encountered a truck which passed them and which was speeding. He testified that Cioffi said that this was one of his trucks and wrote down the truck's number. Although, Holck asserted that the driver was speeding and swerving on the road, he could not say how fast the truck was going as he could not see the speedometer on the car that Cioffi was driving. In his opinion, the truck may have been going about 70 miles per hour.

Thompson testified that on returning to the terminal Hightower Sr. told him that Cioffi had seen him speeding on the New Jersey Turnpike. According to Thompson, he tries to keep within the legal speed limits and states that he told Hightower Sr. that he was not speeding. Thompson was not given any kind of written warning regarding this incident and he denied that he was speeding. It is noted that this incident occurred about 2 weeks before Thompson was discharged and the reason he was given for his discharge was that work was slow.

[1] At the time of the hearing in this case, the card check had already taken place and the Company had recognized the Union and commenced bargaining.

In my opinion, the Respondent has not overcome its burden of showing that it would have discharged Thompson for legitimate reasons in the absence of his union activity. The evidence presented by the Respondent is, in my opinion, flimsy in the extreme. In the case of the shipments to Power Flex and Dress Barn, the evidence does not tend to show that Thompson did anything wrong. And in the case of his alleged speeding, Thompson credibly denied that he was speeding. The evidence establishes company knowledge of union activities and anti-union animus. Added to that is the evidence that Thompson, on several occasions, expressed his prounion position to Cioffi, while expressing skepticism about Cioffi's promises which were made to induce him and other employees to refrain from supporting the Union. Based on the above, it is my conclusion that the Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Thompson.

I also conclude that the above-unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As the Respondent, prior to the trial of this case and in accordance with the above-noted stipulation, has already recognized and commenced bargaining with the Union as the representative of the employees in the unit described above, I shall not recommend that a bargaining order be issued at this time. This is, however, conditioned on the Respondent's continued willingness to bargain in good faith for a reasonable period of time. *Royal Coach Lines*, 282 NLRB 1037, 1038 (1987); *Rockwell International Corp.*, 220 NLRB 1262 (1975); and *Fertilizer Co. of Texas*, 254 NLRB 1382, 1385 (1981).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [2]

ORDER

The Respondent, Cargo Logistics, Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or threatening to discharge employees because they choose to be represented by Teamster, Chauffeurs and Warehousemen of America, Local 560, AFL–CIO.

(b) Threatening to shut down its business and operate under a different name if employees choose the Union as their representative.

(c) Threatening to replace its employees with owner-operators if they choose to be represented by the Union.

(d) Interrogating employees about their membership in or support for the Union.

(e) Soliciting grievances and promising benefits in order to induce employees to refrain from joining or supporting the Union.

(f) Soliciting employees to sign a petition withdrawing their support for or membership in the Union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Thompson, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in, Newark, New Jersey, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 27, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for joining or supporting the Teamster, Chauffeurs and Warehouseman of America, Local 560, AFL–CIO.

WE WILL NOT threaten to shut down our business and operate under a different name if employees choose the Union as their representative.

WE WILL NOT threaten to replace our employees with owner-operators if they choose to be represented by the Union.

WE WILL NOT interrogate employees about their membership in or support for the Union.

WE WILL NOT solicit grievances and promise benefits to our employees in order to induce them to refrain from joining or supporting the Union.

WE WILL NOT solicit our employees to sign a petition withdrawing their support for or membership in the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer William Thompson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of William Thompson and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that any such references will not be used against him in any way.

CARGO LOGISTICS